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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 24

IN THE MATTER OF FLORIDA EAST COAST RAILWAY CO., *Debtor*
ST. JOE PAPER CO., ET AL., *Petitioners*

v.

ATLANTIC COAST LINE RAILROAD CO., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth District

BRIEF ON BEHALF OF PETITIONER RAILWAY LABOR EXECUTIVES' ASSOCIATION

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Dated: September 24, 1953

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BRIEF ON BEHALF OF PETITIONER RAILWAY LABOR EXECUTIVES' ASSOCIATION

OPINIONS BELOW

The opinion of the Court of Appeals supporting the judgment under review (R. Vol. II, p. 717) is reported at 201 F. 2d 325, and the opinion of the District Court (R. Vol. I, p. 127) is reported in 103 F. Supp. 825.

Prior opinions of both courts below, however, deal with the single question here presented which is the only issue in the case on which this Court granted certiorari. This

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results from the fact that at the time the judgment appealed from below was rendered the Court of Appeals regarded the issue here presented as settled by its prior decision disapproving a plan of reorganization immediately preceding the one here involved. Its opinion is reported at 179 F. 2d 538, and the opinion of the District Court (R. Vol. V, p. 466) is reported at 81 F. Supp. 926.

JURISDICTION

The judgment of the Court of Appeals was entered January 19, 1953. The petition for certiorari in which we joined with the St. Joe Paper Company and certain of the other petitioners was filed March 21, 1953, and was granted May 4, 1953 (345 U. S. 948). Jurisdiction of this Court rests on Title 28, U. S. C. § 1254 (1).

QUESTION PRESENTED

The single question here presented is whether § 77 of the Bankruptcy Act authorizes the Interstate Commerce Commission, in approving a plan of reorganization of a bankrupt railroad, to compel a merger of the debtor carrier with another railroad by a transfer of its property in exchange for securities of the transferee railroad, when such merger or transfer has not been initiated or consented to by the debtor railroad but is opposed by the overwhelming number of its security holders who are its equitable owners.

STATUTES INVOLVED

The pertinent statutory provisions involved are adequately set forth in the separate briefs filed herein by the petitioners St. Joe Paper Company, et al., and the Southern and Seaboard Railroads.

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STATEMENT

1. The Railway Labor Executives' Association—Its Interest and Standing

The Railway Labor Executives' Association is a voluntary unincorporated association of eighteen standard railroad labor organizations representing approximately a million railroad employees. Most of these constituent organizations represent the overwhelming majority of employees of the Florida East Coast Railway for purposes of collective bargaining, and maintain agreements concerning their rates of pay, rules, and working conditions.

These employees have a direct and pecuniary stake in the outcome of this proceeding. If the judgment of the Court of Appeals is affirmed and the reorganization plan approved by the Commission subsequently consummated, a large number of these employees will lose their jobs entirely, others will be compelled to move to distant points on the Atlantic Coast Line system in order to retain railroad employment, and many will lose valuable rights of seniority as well as service credits toward annuities payable to them under the Railroad Retirement Act. On the other hand, if the judgment of the court below is reversed on the issue now pending before the Court, an internal reorganization of the Debtor will be in order and these adverse effects upon employees will not result. For this reason, the interest of the Association from the outset has been, and is now, to see the over-all purpose of Section 77 served by true rehabilitation of the debtor through an internal reorganization or through such other means as will preserve its continued existence.

The Association was permitted to intervene in the initial proceedings conducted in this case before the Interstate Commerce Commission[1] where it presented evidence, filed briefs, and fully participated as a party in interest. It was

[1] For brevity and convenience of reference, the several petitioners, respondent, and the Interstate Commerce Commission will be referred to by their short titles throughout this brief.

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also permitted to intervene in the original District Court proceedings before Judge Sibley, where it filed its Protest to the modified plan of reorganization approved by the Commission in its Third Supplement Report and Order of April 8, 1947 (R. Vol. IV, 267 I. C. C. 295), which approval was reaffirmed by the Commission's Fourth Supplemental Report and Order of March 25, 1948 (R. Vol. IV, 267 I. C. C. 729).[2] By these orders the Commission by a 6 to 5 decision reversed a proposed unanimous decision of nine commissioners which had rejected a proposed transfer of control to the Atlantic Coast Line (R. Vol. IV, 261 I. C. C. 151, 187-192).

Three specific grounds of protest were raised by the Association to the Commission plan of reorganization approved in 1948, or what is generally referred to as the Commission's Third Plan. The first was addressed to the statutory power of the Commission to order a compulsory merger of the Florida East Coast Railway with the Atlantic Coast Line. The other two objections concerned the requirements of the Interstate Commerce Act with respect to the interests of railroad employees in proposed mergers or consolidations and the failure of the Commission in this proceeding to comply with such requirements. The latter two objections are not pertinent on this review because the Court's grant of certiorari was limited to the one question of statutory power, 345 U. S. 948-949. It is significant, however, in connection with the basic issue of law which is before the Court that no one authorized or empowered to speak for the debtor carrier has consented to its unification with the respondent Coast Line, and that such action is strenuously opposed by every craft of the debtor's employees, hundreds of its shippers, well over two-thirds of its security holders and by practically every community, city, town and village served by the Florida East Coast

[2] These reports of the Commission are set forth in the volume of the Record cited immediately preceding the pagination of the Record itself.

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Railway. See R. Vol. IV, 267 I. C. C. 295 at 391; 267 I. C. C. 729 at 746; R. Vol. I, 282 I. C. C. 81 at 191.

With respect to its first ground of protest, the Association has urged from the inception of the Commission's "forced merger" in the District Court that § 77 of the Bankruptcy Act, properly construed, contemplates no extension of the powers of the Commission in connection with mergers or consolidation of carriers over and above those provided in § 5 of the Interstate Commerce Act, which section is conceded by all parties to confer no authority upon the Commission, or any other agency or tribunal administrative or judicial, to compel any merger, consolidation, or transfer of carriers, their properties, operations, or corporate identities without the consent of both carriers.

In its appearance before both the District Court and Court of Appeals in opposition to the Commission's so-called Fourth Plan of reorganization, certified by its Fifth and Sixth Supplemental Reports and Orders (R. Vol. 1, 282 I. C. C. 81; 282 I. C. C. 195), which is the plan of reorganization approved by the judgment below now under review by this Court, the Association expressly preserved its objection that the Commission's Fourth Plan, like the Third Plan, was contrary to law in that it required a forced merger or integration of two carriers without the consent of one of those carriers or anyone legally empowered to give its consent and over the protest of the equitable owners of the property in violation of the intent and the purpose of § 77 of the Bankruptcy Act.

The history of the disposition of this ground of protest by the courts below, commencing with Judge Sibley's opinion for the District Court reported at 81 F. Supp. 926, is adequately discussed in the brief filed on behalf of petitioner Southern and Seaboard (pp. 10-17), and need not be duplicated here.

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2. Purpose and Scope of This Brief

A painstaking and thorough analysis of the pertinent provisions and legislative history of § 77 of the Bankruptcy Act as enacted in 1933 and amended in 1935 is ably set forth in the separate brief filed herein by the petitioners Southern and Seaboard Railroads, as well as in the separate brief filed by petitioners St. Joe Paper Company, et al. We do not intend to burden this Court with repetition of these details. Rather it will be our purpose to discuss and answer the contentions advanced by the Commission and the arguments which respondent has addressed to this Court and to the courts below in support of the proposition that the Commission is legally empowered to compel mergers and consolidations incident to reorganization under Section 77 of the Bankruptcy Act. Brief comment will also be made on the holdings of the courts below on the issue presented. In this way we hope this brief will serve the useful purpose of affording the Court some of the answers to the several, and frequently inconsistent, positions taken by the respondent, the Commission, and a majority of the Court of Appeals.

Ordinarily we would not undertake to anticipate arguments which might only be expected in a later brief on the merits to be filed by respondent. Here, however, respondent in opposing certiorari filed with this Court a printed brief of 62 pages supplemented by appendices of 29 printed pages. Moreover, we have had the benefit of extensive argument by respondent over a period of years in briefs filed with the courts below, as well as the written opinions of those courts and the Commission on the question here under consideration. Respondent may depart or abandon much of what has been previously argued in support of its position, but it can hardly enlarge upon it. Accordingly, it seems appropriate to bring petitioners' affirmative arguments to grips with the principal opposing contentions—something we respectfully submit, the Court of Appeals failed to do in reaching its conclusion that the Commission

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could require involuntary mergers or consolidations under Section 77.

In view of the limited scope of our brief and the nature of the argument, we shall not preface it with a summary.

ARGUMENT

After reading all of the arguments urged in support of the Commission's asserted power to compel a merger of the Debtor with the Coast Line by a transfer of the properties of the former carrier without the assent of anyone empowered to speak on its behalf and over the objections of practically all of its security holders who are its equitable owners, it is significant to us to note that the proponents of such a plan not only disagree among themselves as to the reasons for reaching the conclusion that the Commission has such authority under Section 77, but the same proponent has found it either necessary or expedient at different stages of the litigation to advance totally different reasons for reaching that conclusion.

The arguments urged in support of the Commission's forced merger power fall under three basic headings as indicated by respondent's brief in opposition to certiorari. First, there are the contentions with respect to the relationship of Section 77 of the Bankruptcy Act and Section 5 of the Interstate Commerce Act and the requirements of the so-called "consistency clause"; second, the asserted operation of the "cram-down" provision of Section 77 (e), and third, certain decisions of this Court alleged by respondent to support its position.

In the ensuing portions of this argument we shall discuss the contentions which have been advanced by the Commission, respondent, and the courts below as they relate to each of these basic points. Particular attention will be devoted to the statements of those six Commissioners who issued the majority report supporting the Commission's Third Plan of reorganization because it was here that the Commission dealt with the statutory question now under

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review by this Court, and because it is *Commission* authority and not that of the courts which is challenged by petitioners, and consequently its views and construction of its statutory powers are of primary importance.

I.

THE CONTENTION THAT SECTION 77 OF THE BANKRUPTCY ACT PERMITS A PLAN OF REORGANIZATION PROVIDING FOR COMPULSORY TRANSFER OF THE DEBTOR'S PROPERTY TO RESPONDENT IS LEGALLY UNSUPPORTABLE

A. THE "CONSISTENCY CLAUSE" REQUIREMENTS OF SECTION 77 PROHIBIT COMMISSION ACTION UNAUTHORIZED UNDER THE INTERSTATE COMMERCE ACT AND PRECLUDE COMPULSORY MERGERS OR CONSOLIDATIONS

In its Fourth Supplemental Report of March 25, 1948, the Commission rejected the argument that a merger must be voluntary and that the powers exercised by the Commission under Section 77 of the Bankruptcy Act with respect to mergers and consolidations must be consistent with those powers granted to it under the Interstate Commerce Act. The Commission takes the position that the language of Section 77 is plain and unqualified with respect to its power to compel involuntary mergers, and asserts that its powers thereunder with respect to approval of merger plans are not limited by the Interstate Commerce Act. The Commission states:

> "... It would be strange for Congress, after giving us express authority to do certain things under the Bankruptcy Act in order to rehabilitate an insolvent carrier, to thereafter limit our authority by the express provision of the Interstate Commerce Act. The Interstate Commerce Act deals with solvent carriers and contains no machinery for dealing with bankruptcy. Its 'provisions and purposes' are not directed to the rehabilitation of insolvent carriers. To hold that our powers under the Bankruptcy Act to promulgate a plant of reorganization for a debtor corporation are

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subordinate to our powers under the Interstate Commerce Act would defeat the bankruptcy statute."[3]

Since it is our position that Congress did intentionally and expressly limit the Commission's reorganization authority under Section 77 of the Bankruptcy Act by the express provisions of the Interstate Commerce Act, it now becomes necessary to examine the limiting language contained in Section 77 as originally enacted, and also to determine whether the 1935 amendments to Section 77 eliminated or preserved such limitation. We believe that the statute clearly on its face prescribes the limitation in Section 77 (f) which precludes the Commission from approving any merger inconsistent with the provisions and purposes of the Interstate Commerce Act. But since the Commission has itself raised the doubt of the intention behind this provision it becomes necessary by reference to legislative history to confirm that the language means what it says. If it does, the fact of whether it is "strange" for Congress to have done so, as the Commission asserts, is beside the point, and any such argument should be addressed to Congress and not to the courts.

1. The Express Provisions of the 1933 Act Squarely Refute the Commission's Contention that Its Reorganization Powers Are Not Limited by the Interstate Commerce Act

As enacted in 1933, Section 77 of the Bankruptcy Act clearly precluded approval by the Commission of a plan of reorganization except as authorized by the Interstate Commerce Act. Section 77 (b) then read:

> "A plan of reorganization within the meaning of this section . . . (3) shall provide adequate means for the execution of the plan, which may, *so far as may be consistent with the provisions of sections 1 and 5 of Title 49*, include the transfer or conveyance of all or any part of the property of the debtor to another corporation or to other corporations or the consolida-

[3] 267 I.C.C. 729, 731, R. Vol. IV.

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> tion of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other railroad corporation . . ." (Italics supplied).[4]

Subsection (e) contained the same express requirement of consistency with the "purposes" of the Interstate Commerce Act.

The legislative history of the bill which resulted in Section 77 of the 1933 Act is abundantly clear on the proposition that not only were involuntary or enforced mergers and consolidations not contemplated but also that Congress expressly intended that nothing in the Act should confer such a power upon the Commission. As stated above, the detail of this legislative history is thoroughly discussed in the separate brief filed by petitioners Southern and Seaboard and need not be repeated here.

Once this legislative history is examined, there is no support for the observation in the Commission's report that "It would be strange for Congress, after giving us express authority to do certain things under the Bankruptcy Act in order to rehabilitate an insolvent carrier, to thereafter limit our authority by the express provision of the Interstate Commerce Act." Congress did just exactly that when it wrote subsections 77 (b) and (e) in 1933, and the "consistency clause" contained in these two subsections permits no other construction.

As a matter of fact, unlike the Commission, respondent Coast Line concedes that under the 1933 Act the Commission could not have compelled the merger of the debtor with the Coast Line over the objections of its security holders, but it attributes such lack of statutory authority to the absence of the "cram-down" provision in the 1933 enactment.[5] We do not agree with this explanation by respondent for the lack of statutory authority in the Commission to compel an involuntary merger or con-

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[4] See 11 U.S.C.A. § 205, Historical Note, pp. 198-199.

[5] Respondent's brief in opposition to certiorari, p. 37.

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solidation for reasons which we shall later discuss in our analysis of the language and purpose of the "cram-down" amendment in 1935.

2. Respondent's Contention that the Only Purpose of the "Consistency Clause" Was to Insure Commission Observance of the Public Interest Requirements Governing Its Approval of Mergers under the Interstate Commerce Act Ignores the Plain Language of the Provision and the Precise Purpose for Its Inclusion by Congress

First, however, it becomes important to notice and discuss an additional contention advanced by respondent with respect to the presence and effect of the "consistency clause" in both the 1933 and 1935 legislation. The contention—made to our knowledge for the first time in respondent's brief in opposition to certiorari—has significance only because it demonstrates respondent's awareness that at least before this Court the consistency clause requirements may not be ignored completely, as was done by the majority of the Court of Appeals in rejecting Judge Sibley's view that Congress intended in Section 77 as well as under the Interstate Commerce Act to limit the Commission's authority with respect to mergers and consolidations to those which were voluntarily proposed by both carriers involved. See 81 F. Supp. 926 at 932-933.

In its brief in opposition to certiorari (pp. 26-28), respondent seeks to explain away the requirements of the "consistency clause" on the basis of what it claims to be an important distinction between *"the public interest aspects"* of a unification and what respondent calls *"the private interest aspects"*. It is argued that the "consistency clause" of Section 77 (f), as amended in 1935, and the predecessor clauses contained in subsections (b) and (e) of the original 1933 Act, "were intended *only* to make sure that, in deciding what would be 'compatible with the public interest' with respect to a Section 77 plan providing for a unification of two or more railroads, the Commission's decision would not be inconsistent with the

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decision it would make as to such *public interest aspects* if the unification were before it on a Section 5 application."

This is an ingenious contention obviously contrived to explain away the plain meaning which the legislative history unequivocally demonstrates Congress intended should be attributed to the language which it used. The substitute meaning suggested by respondent is devoid of any support either in the language itself or in the supporting legislative history. Congress drew no distinction between the so-called public interest aspects and the private interest aspects of a railroad consolidation. Happy is the lawyer who can succeed in ascribing his own meaning, in support of his client's case, to Congressional language indicating no such meaning. Indeed, the involved effort is subsequently disclosed as one seeking to establish a premise from which to take advantage of a quotation from Mr. Justice Frankfurter's dissenting opinion in *Schwabacher* v. *United States,* 334 U.S. 182 at 206, which is set forth on page 28 of respondent's brief.

The effort, however, is unpersuasive. First, this Court did not have before it in the *Schwabacher* case the problem presented in this case. On the contrary, it was dealing with the issue of whether state law concerning stockholders' interests was superseded by the Commission's exclusive and plenary power to approve a merger *voluntarily* submitted to it by the two carriers involved. Second, Mr. Justice Frankfurter's dissent was to the effect that the state law was not superseded as held by the majority of this Court, and in giving his reasons for this conclusion the learned Justice was distinguishing between disposition of *stockholders' claims* in transactions under Section 5 and those in connection with reorganization proceedings under Section 77. Neither the majority of the Court nor the dissenters who joined in Mr. Justice Frankfurter's opinion were remotely concerned with the problem of the Commission's power to effect an involuntary merger. Once this

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difference in issues is appreciated, the language used by Mr. Justice Frankfurter upon which respondent relies is perfectly understandable and at the same time completely inapposite to respondent's contention. To ascribe to Mr. Justice Frankfurter an intention, by language dealing with the narrow issue before him, to sweep aside repeated statements by Congress that in enacting Section 77 it was still denying the Commission's authority to *compel* mergers and consolidations would indeed distort the language of his opinion.

That the opinion cannot be so distorted is plainly disclosed by other passages not quoted by respondent. For example, prior to the language which is quoted, Mr. Justice Frankfurter had carefully observed (334 U.S. 202 at 205) that, while he had no doubt that Congress could compel the unification of railroad properties, theretofore in separate ownership, Congress had deliberately refrained from doing so. Moreover, in discussing the respective powers granted to the Commission under the Interstate Commerce Act and under the Railroad Reorganization Statute, he carefully refrained from the conclusion that Congress had given the Commission a different power with respect to compelling mergers under the Bankruptcy Statute, and pointedly limited his distinction to a grant of power to the Commission "to formulate plans of reorganization, the terms of which, if fair and equitable, *may override state-created legal rights of stockholders who do not assent.*" (P. 205, Italics supplied.) At a further point in the opinion it is even more clearly evident that the language upon which respondent relies from Mr. Justice Frankfurter's dissenting opinion was not intended to have the meaning which is ascribed to it. In making practically the same observation as that quoted by respondent, Mr. Justice Frankfurter makes it crystal clear that his reasoning is limited to stockholder claims and is not to be expanded to endorse a claim that the Commission may compel a merger under Section 77 although it cannot under the

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Interstate Commerce Act. The particular passage (p. 208) states:

> "The considerations relevant to voluntary railroad mergers sharply differ from those that control liquidations and reorganizations under § 77 of the Bankruptcy Act. (See also Railroad Reorganization Act, Pub Laws No. 478, 80th Cong 2d Sess April 9, 1948.) A railroad in reorganization is administered by a bankruptcy court which has control of all its assets. *The power of dealing with all claims is inevitably concentrated in that court.* In merger proceedings, however, there is no obstacle to the practice pursued by the Commission of deciding what is 'just and reasonable' and in 'the public interest' as to each class of securities, while at the same time permitting any dissenter to stand on the terms of the particular stock issue, leaving to State law to determine what those terms are, provided only that the function of the new corporation, as part of an economic and efficient national railroad system, would not be affected by allowance of such claims." (Italics supplied.)

In fairness to respondent, it should be said that even it appears to recognize that support for its so-called distinction between the public interest and private interest aspects of a unification contained in the *Schwabacher* case dissent is limited to sanctions imposed "against creditors and stockholders."[6]

Apart from respondent's reliance on certain language from the dissent in the *Schwabacher* case, the short answer to its contention is that it completely begs the issue. To restate the contention, respondent—in an obvious effort to avoid the effect of coupling the "consistency clause" with an admitted provision and purpose of the Interstate Commerce Act that all mergers and consolidations be voluntary and not compelled—makes the sweeping claim that Congress intended by such clause *only* to insure that the Commission would decide the merits of a merger under

[6] Respondent's brief in opposition to certiorari, p. 29.

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Section 77 on the same basis of public interest aspects which govern its determination under Section 5. It is at once apparent that this contention completely avoids the question of whether the Commission has any authority to *compel a merger,* which is of course what respondent would like to do and at the same time give some plausible explanation to this Court as to why the "consistency clause" was included in the 1933 enactment of Section 77 and retained by the 1935 amendments.

That such an argument is specious is immediately apparent upon analysis. First of all, there is not a shred of support either in the language of the "consistency clauses" contained in subsections (b) and (e) of Section 77 as originally enacted, or in the legislative history accompanying that enactment or its amendment in 1935, for concluding that Congress had any such limited intention in writing the "consistency clause".

Second, the language of the "consistency clauses" as originally embodied in subsections (b) and (e) and later in subsection (f) clearly do not limit their reference or applicability to the so-called public interest aspects, which are broadly set forth in Section 5 (2)(c) of the Interstate Commerce Act.[7] On the contrary, the clause clearly requires consistency with the provisions and purposes of the Act as a whole as it relates to railroads.[8] One of the provisions included is of course Section 5 (11) of the

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[7] As a matter of fact, when respondent made a somewhat similar argument below it directed such argument to the provisions and purposes of Section 5(2)(c) of the Interstate Commerce Act which it claimed were all inclusive and accordingly limited the effect to be given to the "consistency clause".

[8] The exact language of Section 77 (f) is ". . . not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended. . . ." Chapter 1 of Title 49 is the entire Interstate Commerce Act as it concerns railroads, the other chapters dealing with motor carriers, water carriers, and freight forwarders. In fact, the reference in subsection (f) is even more sweeping than the original reference in subsection (b)(3) which relates only to sections 1 and 5 of chapter 1.

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Interstate Commerce Act, which, as explained above, permits the exercise of authority by the Commission only with respect to *voluntary* mergers. The fact that this section does not expressly *prohibit* involuntary mergers is of no moment. Its intention and purpose is clear that only such mergers as are *voluntarily proposed* may be acted upon by the Commission.[9]

The patent fallacy of respondent's attempt to avoid Section 5 (11) is further illustrated by the fact that the employee protection provided by the Commission in its several reorganization plans was derived from the requirements of Section 5 (2)(f) of the Interstate Commerce Act, not Section 5 (2)(c)(4). The objective of the latter section imposes an entirely different requirement than Section 5 (2)(f), namely that the interests of employees must be considered by the Commission in *passing upon* any transaction subject to Section 5 (2). The provisions of Section 5 (2)(f) do not come into play until the Commission has decided to *approve* a transaction submitted under Section 5 (2).

Moreover, the very fact that the Commission provided employee protection pursuant to the requirements of Section 5 (2)(f) is concrete proof that it recognized that its plan of reorganization must be consistent with the requirements of the Interstate Commerce Act, for there is no provision in Section 77 requiring employee protection except the consistency requirements of subsection (f). How then can the Commission and respondent concede the force and effect of subsection (f) in one respect and deny it in another?

The important point in all this discussion, however, which has never been answered by any of the proponents of the Commission's asserted power to compel a forced

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[9] *Schwabacher* v. *United States*, 334 U.S. 182, 193, 194, 205-206. It is too clear from this decision to warrant argument that the Interstate Commerce Act empowers the Commission to approve and authorize, *but not to compel*, the merger or consolidation of one carrier with another.

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merger, is that when fears were expressed in Congress that Section 77, as enacted in 1933 and as amended in 1935, might be held to extend the Commission's merger and consolidation powers so as to give it a power to coerce consolidations under the Bankruptcy Act, the "consistency clause" was time and again pointed to as assuring that those fears were unwarranted and that no such coercive powers were being granted. That was the universal understanding and assurance on which Congress acted when it amended Section 77 in 1935. To us, this is far more meaningful than any of the superficial arguments which have been adduced from time to time to explain away what is unequivocal and unqualified in the several legislative reports and hearings.

3. The Commission's Reasons for Concluding that the "Consistency Clause" Does Not Prohibit Compulsory Mergers are Untenable

An argument by the Commission similar to the preceding contention is relied upon by respondent in its brief in opposition to certiorari (p. 29). In its Fourth Supplemental Report the Commission said (267 I.C.C. 731-732):

> "The language used in subsection (f) is 'not inconsistent with.' The approved merger plan is not inconsistent with the Interstate Commerce Act. There is no prohibition in the Interstate Commerce Act against the merger of an insolvent railroad with a solvent railroad. We may, pursuant to our power under Section 77 of the Bankruptcy Act to deal with bankrupt railroads, promulgate a plan which provides that the bankrupt shall be merged with a solvent corporation, and the court which has jurisdiction of the bankrupt's property may confirm the plan. The solvent corporation here is willing. There is nothing in the Interstate Commerce Act to prohibit us from approving such a transaction."

By this statement the Commission seeks to evade the issue in reasoning that there "is no prohibition in the

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Interstate Commerce Act against the merger of an insolvent railroad with a solvent railroad." This is not the point in controversy. Petitioners make no claim that the Commission cannot *authorize,* either under the Interstate Commerce Act or under Section 77 of the Bankruptcy Act, the unification of an insolvent and a solvent carrier *if the unification is jointly sought.* The question here is whether the Commission is authorized to order the merger of an insolvent railroad with a solvent carrier without the consent of those entitled to speak for the insolvent carrier.

The Commission's argument is not only specious on its face but it is positively refuted by a colloquy between Mr. Leslie Craven, who drafted the bill transmitted by the Federal Coordinator of Transportation (Commissioner Eastman) which resulted in the 1935 amendments to Section 77, and the Chairman of the House Committee who was conducting hearings on the bill. This is the pertinent exchange:

> "Mr. Craven. . . . There is another provision with reference to the jurisdiction of the Commission as to sales *and consolidations.* I do not know that I can lay my finger on it this minute, *but it has the same provision which was in the previous act. We have not disturbed it.*
>
> "The Chairman. It does not modify this power, does it?
>
> "Mr. Craven. No sir.
>
> "The Chairman. Anyway it is in the law and you say that it is in this bill?
>
> "Mr. Craven. Yes."[10] (Italics supplied.)

4. The Commission's Reliance on the Shifting of the "Consistency Clauses" from Subsections (b) and (e) of the 1933 Act to Subsection (f) of Section 77 as Amended in 1935 Directly Contravenes Congressional Intent

The foregoing assurance to Congress by Mr. Craven on behalf of the Federal Coordinator of Transportation is likewise a complete answer to the Commission's argument

[10] *Hearings before the Committee on the Judiciary, House of Representatives, on H. R. 6249,* 74th Cong., 1st Sess., p. 59.

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that the shifting of the "consistency clause" in 1935 from subsection (b)(3) to subsection (f) did away with any limitation on its power to formulate a plan compelling an involuntary merger. The Commission states (267 I.C.C. 729 at 731):

> "The opponents of the approved merger plan seek to subordinate section 77 of the Bankruptcy Act to the Interstate Commerce Act. They point out that subsection (f) of Section 77 provides that upon confirmation of a plan we shall grant authority 'for the issue of any securities, assumption of obligations, transfer of property, sale, consolidation or merger of the debtor's property, or pooling of traffic to the extent contemplated by the plan and not inconsistent with the provisions and purposes of Chapter I of Title 49'. They contend that since the Interstate Commerce Act does not authorize us to require involuntary mergers our hands are likewise tied under the Bankruptcy Act. We do not agree with that contention. The quoted provision of subsection (f) of section 77 is not a limitation on the plan which we are authorized to approve under subsection (b). Nothing is said in subsection (b) nor in subsection (e) regarding the Interstate Commerce Act. When we reach this provision (subsection (f)) in the statute, all that is necessary to approve and confirm the plan has been provided for. The plan is then ready to be made effective . . ."
>
> "We construe the reference to the Interstate Commerce Act contained in subsection (f) of section 77 to mean that after the plan has been adopted by this Commission and the court, this Commission shall grant such additional authority as may be required to carry out the plan, observing the provisions of the Interstate Commerce Act where applicable, and the national transportation policy contained therein."

What the Commission overlooks by the foregoing statement is that the provisions of subsection (b) do not purport to deal with its *powers* but discuss the elements of a plan for reorganization, and that the provisions of sub-

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section (f) do deal with its powers and clearly limit its power *to "grant authority" for consolidations or mergers* to the extent that they are inconsistent with not only the provisions of the Interstate Commerce Act but also its *purposes.* One of the definite purposes of Section 5, as shown above, is that all mergers and consolidations shall be voluntary.

Moreover, the Commission in stating that it does not reach the limitation under discussion until subsection (f) overlooks the fact that subsections (c)(2), (3) and (6) definitely tie the authority of the Commission under Section 77 to its powers under the Interstate Commerce Act. It is difficult to perceive how Congress, after carefully delimiting the jurisdiction of the Commission in subsections (c)(2), (3), (6) and (f), intended that in exercising its powers under subsection (d) the Commission could wholly negate such limitations and assume a power which had been consistently denied to it not only under the Interstate Commerce Act but also under the 1933 Bankruptcy Act without a word of explanation by Congress as to why it was being done.

The net effect of what the Commission claims is that Congress has authorized it to compel an involuntary merger before confirmation of a plan, because there is no express limitation contained in subsections (b), (d) or (e), and therefore did not mean what it said in subsection (f) where it expressly denies the Commission power to grant authority for a compulsory merger after confirmation. It is too well established to require citation of authority that this Court will not sanction such a tortured construction of a statute.

Since Congress clearly did not intend to confer the power asserted by the Commission in this case, certainly the mere relocation within the statute of the language of limitation on the Commission's powers cannot properly be construed to have conferred it. Particularly is this so in view of the long history of Congressional opposition to the grant of

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such power, and the absence of any explanation of intention to provide it. On the contrary, we submit it is self-evident that the very absence of discussion on the relocation of the "consistency clause" demonstrates that Congress intended that the modified language as it now stands in subsection (f) was to have exactly the same meaning and effect that the corresponding clause had in the 1933 Act in subsections (b) and (e). As to mergers and consolidations, it is a limitation on the provisions of subsections (b)(5) as well as on subsection (f) where it physically appears.

Can the Commission seriously contend that under Section 77 (b) it may approve a plan which, as a means for its execution, includes a compulsory merger or transfer (not authorized under the Interstate Commerce Act), and still concede, as it must, that under Section 77 (f) upon confirmation of the plan it may not grant authority for such merger because it is inconsistent with the Interstate Commerce Act? To read the language of subsection (b) as construed by the Commission would be to ignore the basic limitations on the Commission's jurisdiction clearly evident when the act is read as a whole and would attribute an intention by Congress to undo with one hand what it has unmistakably secured with the other. Cf. *United States* v. *American Trucking Assns.*, 310 U.S. 534, 542.[11]

5. The Commission's Contention That the Merger Is Not Involuntary Because No Stockholders of the Debtor Have Objected is Specious

The Commission further contends that there is nothing of record in this proceeding to show that the merger has been objected to by the debtor railroad. It states in its Fourth Supplemental Report (267 I. C. C. 729 at 732):

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[11] Compare this holding of the Supreme Court, particularly in the circumstances of this case, with the effort of the Commission in its report (267 I.C.C. 729 at 731) to avoid the legislative history of Section 77 by its statement "Where the language of a statute is plain and unqualified, that language must prevail. *Helvering* v. *City Bank Co.*, 296 U.S. 85."

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> "As applied to this proceeding the argument that the word 'merger,' contained in subparagraph (b)(5) means a voluntary merger is beside the point. There is nothing of record to show that the merger of the Florida East Coast with the Atlantic Coast Line is objected to by either. The stockholders of the Florida East Coast have not objected. The objection comes from certain of its bondholders."

Such a claim by the Commission clearly begs the issue before the Court because it is *consent*, not absence of objection, which under the Interstate Commerce Act is required before a merger can be considered, much less approved, by the Commission.

Moreover, this is a strange conclusion from an administrative body which has found in its reports that the stockholders of the debtor own no equity and have no rights.[12] Under such a finding, when approved by the court, it is perfectly clear that the Commission does not have to submit the plan to the stockholders for acceptance or rejection, but it must under Section 77 (e) submit the plan to the creditors of each class whose claims have been filed and allowed for acceptance or rejection. In short, the consent required to make the merger voluntary must come from the only persons entitled to give it in this case, i.e., the bondholders who in the eyes of the law are the equity owners of the debtor's property. *Investment Registry* v. *Chicago M. E. R. R. Co.*, 212 Fed. 594, 609 (7th Cir.); *In re Central Funding Corp.*, 75 F. 2d 256, 259 (2d Cir.).

B. THE CRAM-DOWN PROVISION OF SECTION 77 (e) DOES NOT EMASCULATE THE REQUIREMENTS OF THE "CONSISTENCY CLAUSE" OR EMPOWER THE COMMISSION TO COMPEL MERGERS AND CONSOLIDATIONS

The arguments of respondent really boil down to a determination of whether the cram-down provision added to

[12] Third Supplemental Report, 267 I.C.C. 295 at 383; Fourth Supplemental Report, 267 I.C.C. 729 at 756, R. Vol. IV.

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Section 77 (e) in 1935 grants the Commission the power to compel mergers and consolidations which respondent concedes the Commission did not possess under the 1933 Act.

In view of respondent's almost complete reliance on the "cram-down" provision added to Section 77 by the 1935 amendments to the Bankruptcy Act, it becomes important to consider the language which Congress employed in Section 77 (e) and the purpose for which the amendment was made. It is our position that neither the sponsors of the legislation nor the Congress which passed it had any idea or intention that in so doing the Commission would be thereby authorized to compel mergers or consolidations under Section 77 contrary to its established authority under Section 5 of the Interstate Commerce Act. We contend that the language of subsection (e) does not support such a claim, that the legislative history of the provision is barren of any such intention, and finally that if it is given the construction for which the Commission and respondent contend, the "consistency clause" of subsection (f) becomes a nullity contrary to the obvious purpose for which it was inserted.

The argument presented by the Commission with reference to subsection (e) of Section 77 in support of its asserted power to effect compulsory mergers or consolidations is as follows:

> "Any contention that the merger must be voluntary is nullified by the 1935 amendment to Section 77, which provides, in subsection (e) that 'if the plan has not been accepted by the creditors and stockholders, the judge may, nevertheless, confirm the plan over their objection.' This provision is not restricted to any one of the several plans authorized in subsection (b). It refers to any plan authorized by that subsection. Subsection (b) specifically authorizes a plan which may provide for the merger of the debtor corporation with another corporation. Any involuntary aspects to such merger fade completely in the face of the power of the court to confirm the plan providing for

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> Such a construction of the provision ignores completely such merger over the objection of creditors or stockholders."[13]

the purpose for which the provision was enacted. Subsection (e) is a procedural and administrative provision designed to enable *the court* to prevent dissident *minorities* among a debtor's security holders from blocking final confirmation of a fair and equitable plan. It is a long subsection dealing with numerous powers and functions of the *court* which occur after the Commission has approved, adopted, or formulated a plan and certified it to the court. There is no mention in the subsection of mergers or consolidations or of the Commission's powers with regard thereto because the subsection is not concerned with such items which have been covered by Section 77 in other subsections. In short, subsection (e) *concerns only the power of the judge* in the judicial stage of the proceeding, not that of the Commission with respect to approval of mergers or consolidations.

Apart from the language of subsection (e) which supports the foregoing conclusion, the legislative history of the changes effected by the 1935 Act in this subsection also demonstrates the fallacy of the Commission's construction. In his 1934 Report as Federal Coordinator of Transportation, Mr. Eastman pointed out the reasons why the cram-down clause in subsection (e) was proposed. He stated:

> "While it is not thought desirable to dispense with the securing of consents from the creditors and stockholders, it is clear that there should be provisions whereby a *court* may, under some circumstances, make effective a fair and equitable plan over the dissents of minorities under an arrangement insuring a full hearing to all of the parties concerned and an adjudication by the Commission and the court establishing the fairness of the plan."[14] (Italics supplied.)

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[13] 267 I.C.C. 729 at 732, R. Vol. IV.

[14] H. R. Doc. No. 89, 74th Cong., 1st Sess., p. 101.

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As a result of this recommendation, the court has been granted the power in subsection (e) to do just what was recommended to Congress by Mr. Eastman. In this connection, it is significant to note that the Commission, in quoting the language upon which it relies for its power to effect involuntary mergers or consolidations, omits the qualifying clause immediately following the quoted portion which in itself clearly shows that the powers of the Commission were not even contemplated by the provision. The exact citation reads as follows:

> "Upon receipt of such certificate [results of submission of plan to creditors], the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of the creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection[15] . . . *provided,* that, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds after hearing that it makes adequate provision for fair and equitable treatment of the interests or claims of those rejecting it; *that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts;* and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e) . . ."[16] (Italics supplied.)

Obviously, if the above quoted provision had anything to do with the power of the Commission to effect compulsory mergers or consolidations, Congress would not have written

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[15] Where, as is the case with respect to the plan under review, the Commission has found that the equity of the stockholders has no value or the corporation is insolvent, subsection (e) dispenses with the requirement of submission to classes of stockholders.

[16] 11 U.S.C. § 205(e).

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in the requirement that the judge make his own determination of fact that the rejection by creditors "is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts." If the provision was intended to confer any enlarged power upon the Commission, the judge would merely review the Commission's finding and determination to the extent that it had substantial evidence to support it and not, as the subsection provides, have to make an independent positive finding of fact that the rejection was not reasonably justified.

The very fact that the "cram-down" provision will not apply if the judge finds either that the plan does not provide fair and equitable treatment for those rejecting it, or that the rejection by creditors is reasonably justified, constitutes the strongest kind of proof that the Commission obviously cannot rely on this provision as empowering it to compel involuntary mergers. When it authorizes such a plan of reorganization, at best it can only guess what the judge will decide with respect to subsequent rejection by creditors. At least in the present case, two district judges have already determined that the plan will be rejected by an overwhelming majority of the creditors and that such rejection is reasonably justified in the light of the respective rights and interests of those rejecting it. Under such circumstances, what becomes of the "cram-down" provision upon which respondent relies so completely?

That the provision in question was not even intended by Congress to be utilized *even by a court* in a case such as this, where the *majority* of the equity owners of the debtor are opposed to the merger, is provided by further reference to Mr. Eastman's report to Congress as Federal Coordinator when the revisions to the Bankruptcy Act were submitted. In suggesting the provision for confirmation by a court of a plan over the dissent of minorities, he said:

> "Arbitrary compulsion of plans *over the dissents of the interested classes is not intended,* nor is it be-

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lieved that the courts will override strong dissents *by any large number* of such classes, *or by a single large class,* excepting where it is established that they have no interest in the property. Rather the purpose is to prevent the obstruction of plans *which are favored by the larger classes of creditors* or shareholders, but which are obstructed by minorities in the smaller classes in the attempt to secure unduly preferential treatment. From a legal standpoint there are no apparent objections to this course. It puts emphasis upon the adjudication of these rights by providing for hearings before the Commission and the courts under prescribed principles of substantive law whereby there must be, among other things, a proper recognition of the priorities of the respective interests."[17] (Italics supplied.)

Probably no stronger showing than the foregoing statement can be made for the proposition that the Commission is not thinking and speaking now as it spoke and thought to Congress in connection with the 1935 amendments to the Bankruptcy Act. Implicit in the statement is the recognition that not only mergers and consolidations but all reorganization plans must as a minimum have the assent of any large class of creditors which has a definite interest in the property. The majority bondholders here objecting to the Commission's approved plan obviously have such an interest. This is a far cry from the "judicial" power which the Commission seeks to usurp in overriding that interest.

Moreover, it is demonstrably clear from a review of the legislative record of the 1935 amendments that no one at any time even recommended that the Commission's authority under the 1933 Act with respect to mergers and consolidations should be enlarged. If a change of such obvious importance to rail transportation was intended, certainly clear and convincing proof of such intention would appear in the several proposals to modify the Act or in the comment on such proposals by committees of Congress and

[17] H. R. Doc. No. 89, 74th Cong., 1st Sess., pp. 101-102.

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others concerned with the legislation. Careful examination of the features of the bill, the specific evils in the 1933 Act which were sought to be remedied, the remedies proposed, the Committee Hearings and Reports, and Congressional debate fail to disclose a scintilla of evidence that the 1935 Act was designed or passed with the intention of empowering the Commission or the courts to effect involuntary unifications under Section 77.

It is significant that respondent has been unable to produce a single scrap of testimony in the entire legislative history of the 1935 amendments to substantiate its claim that this sweeping change in Commission authority over mergers and consolidations was effected by the enactment of the "cram-down" provision. Instead, it takes refuge behind the statement that there is no warrant for resort to legislative history when the language of subsection (e) is so clear. We concede that it is clear, but we fail to see any justification whatsoever for the conclusion which respondent draws from that language.

As it admitted in the courts below, respondent again expressly concedes in its brief in opposition to certiorari (p. 37) that the forced merger power exercised by the Commission in this case did not exist under Section 77 as originally enacted, and asserts that the only basis for the claim of such power is the cram-down provision of subsection (e) as Section 77 was amended in 1935. Respondent contends that the reason for this was that before the enactment of this provision in 1935 anything more than one-third in amount of a class of creditors could block a plan whether it provided for a merger or not.

The basic fallacy in this contention, which is the heart of respondent's position and unlike that of the Commission is its sole ground of reliance, is that nowhere in its brief does respondent even attempt to answer the critical question of how the cram-down clause grants any power whatsoever *to the Commission.*

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We have already demonstrated above that the sole authority granted by the cram-down clause is the power it gives the judge on final confirmation to override dissident minorities of creditors whose objections to a plan of reorganization are found to be not reasonably justified in the light of their respective rights and interests, and that such authority is plainly intended to be exercised only after all the functions of the Commission are at an end. The legislative history of the provision squarely supports that construction, and there is not a particle of evidence to support the conclusion that by the provision Congress intended to nullify the requirements of the "consistency clause". There has been no answer by respondent, by the Commission, or by the courts below to these basic propositions, and we can think of none.

II

JUDICIAL DECISIONS RELIED UPON BY RESPONDENT DO NOT SUPPORT ITS POSITION

In previous stages of this case litigation, respondent relied on this Court's decision in the *Denver* case[18] as having squarely decided that the "cram-down clause" of 1935 gave to the Commission the very power of forced merger here exercised. We have read the decision again and again, and cannot find that it held any such thing. Wisely, we think, respondent refrained from citing the *Denver* case as so holding in its brief in opposition to certiorari. It is cited (pp. 6 and 47) as generally dealing with the division of functions as between the Commission and the courts. It is again cited (p. 49) with the observation that this Court did not there give to Mr. Eastman's statement of January, 1935, just the same significance which petitioners seek to give it in this case. Perhaps it was not presented in the same way; we do not know.

[18] *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad*, 328 U.S. 495.

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Respondent also cites the *Denver* case (p. 15) as "construing" the "cram-down" provision, and on page 35, it again cites the decision as having "definitely construed" the "cram-down" provision. Respondent omits to say how it had been construed except to assert that it "applies to any plan which has been approved." This, of course, completely begs the question of whether the Commission itself can lawfully approve a plan embodying a forced merger.

Consequently, we assume that respondent is unwilling to go so far as to assert that this Court's decision in the *Denver* case decided the question here under review. Of course it did not. The statutory issue was not there before this Court and was not dealt with by it. This Court there said, 328 U.S. 495, 501:

> "As no ruling that we are asked or required to make turns upon whether the reorganization is with or without the suggested consolidation, we need not give further consideration to possible differences."

Respondent's brief in opposition to certiorari also asserts (p. 39) that the *Old Colony-New Haven Case*[19] "affords an example of a 'forced merger,' in the sense in which that term has been used by the petitioners." Respondent states: "By the reorganization all of the assets of Old Colony Railroad Company were transferred to the reorganized New York, New Haven & Hartford Railroad Company despite the adverse vote of a majority in amount (of those voting) of the holders of the mortgage bonds of the Old Colony. As the stock of the Old Colony was held to be without value, the holders of the mortgage bonds were just as much the 'equitable owners' of the Old Colony's property as the holders of the First and Refunding Mortgage Bonds can be said to be the 'equitable owners' of the properties of the Florida East Coast."

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[19] *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.*, (2d Cir.) 161 F. 2d 413, *cert. den.*, 331 U.S. 858, rehearing denied 332 U.S. 803.

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Of course that case was not cited, nor could it be, as in any way controlling here. It was really cited to show an alleged absence of conflict between Circuits as a reason for this Court not granting certiorari.

In any event, the *Old Colony Case* was quite different from the situation here. The adverse votes of the Old Colony bondholders were not directed to the fact of acquisition of the Old Colony Railroad by the New Haven, but were directed only to the question of price. 161 F. 2d 413, 417. The Commission had held (244 I.C.C. 258) that the Old Colony was "not capable of successful independent operation, since it had no rolling stock, working capital, or staff of officers, nor has it any reasonable prospects of obtaining them."

A merger under such circumstances, which provided the only chance for the Old Colony to be operated at all, cannot be called a merger forced by the Commission in the sense involved in this case. Here the Florida East Coast is a successful independently operated railroad, with rolling stock, working capital, and staff of officers. Respondent is seeking to acquire the Florida East Coast by a consolidation imposed by the Commission over the objection of the great majority of the owners of the debtor, who object, not merely because of the price they are to be paid, but also to the merger or consolidation as such on the grounds that they wish to continue to hold their ownership in an independently operated railway and are not willing to exchange that ownership for ownership of securities of the Coast Line.

As a practical matter, the equitable owners of the Old Colony had no choice. It was only the force of circumstances there that can be said to have forced the merger. But for that merger the equitable owners of the Old Colony could only have had that railroad sold for salvage value. Their objection to the price they were to receive from the merger did not go to the merger itself.

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III

THE HOLDING OF A MAJORITY OF THE COURT OF APPEALS ON THE ISSUE UNDER REVIEW COMPLETELY IGNORED STATUTORY REQUIREMENTS

This Court may wonder at the complete absence in our argument in reply to contentions by the Commission and respondent of any discussion of the holding by a majority of the Court of Appeals on the question here under consideration. The reason is simply that there is nothing in the opinions below which constitute that holding which even attempts to meet the issue here presented in the way in which we submit it must be met if the conclusions reached are to have any validity.

In rejecting petitioners' contentions here advanced the majority below did so without once mentioning, let alone discussing, the "consistency clause" requirements of Section 77—which, of course, are the only basis we have for even raising the issue. Despite petitioners' submission to the Court of Appeals of extensive written argument on the statutory problem, and despite the presence before it of a carefully considered opinion by Judge Sibley sustaining that argument, a majority of the Court of Appeals saw fit to reject it without discussion of the statutory provisions relied upon, and without any apparent consideration of the legislative history which so plainly discloses the Congressional purpose in enacting such provisions.

We are at a loss to explain this seeming indifference to a position seriously urged by competent counsel, seriously resisted by opposing counsel, and seriously accepted as valid by at least three Circuit judges who considered the issue at various stages of the litigation.

Although, as we noted in the Statement preceding our argument, the history of how the issue before this Court was treated below is adequately discussed in the separate brief filed herein by Southern and Seaboard (pp. 10-17), our comments on the opinions below will probably be easier to follow if we preface that discussion with a brief explana-

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tion of when and how the statutory problem was considered by the lower courts.

The Commission's statutory authority to approve a plan of reorganization providing for a compulsory transfer of the Debtor's property to respondent was first questioned in 1948 before the United States District Court for the Southern District of Florida. The question was raised by protests filed by petitioners in opposition to the Commission's Third Plan of reorganization which was certified to the court by its Third and Fourth Supplemental Reports and Orders, 267 I.C.C. 295; 267 I.C.C. 729 (R. Vol. IV). Protestants asserted, *inter alia*, that such a plan of reorganization was inconsistent with the provisions and purposes of the Interstate Commerce Act and therefore unauthorized under Section 77 of the Bankruptcy Act. This proposition was extensively argued, orally and in written briefs, by all parties to the litigation.

Circuit Judge Sibley, sitting as District Judge Designate, sustained the protests and disapproved the Commission's plan on the ground, among others, that it exceeded the Commission's statutory authority. In a written opinion, 81 F. Supp. 926, 932, he said (R. Vol. V, pp. 475-476):

> "It is very earnestly argued that Subsection b which gives the specifications for a plan, in saying it 'may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation,' etc., does not mean a forced merger, which the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq., has never permitted the Commission to compel, though Congress has often considered the matter. The history of the legislation in adopting Section 77 in 1933, is pointed to as showing that Congress was then concerned that no such thing was to be done under Section 77; and so again in 1935 when the section was revised; and that the reference to the Interstate Commerce Act in Subsection f which the Commission thinks applies only to its actions after confirmations of a plan,

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was intended to apply throughout and became accidentally misplaced in redrafting the Act. Without reciting the history, I think this contention is true. Of late years courts have perhaps gone too far in using legislative history in a very loose way to supplement or change an Act as written. If this question related directly to the liberties or property of the people I would be loath to do it now. But it relates to the extent of the power granted by Congress to its own agent. And the Interstate Commerce Act can be construed with Section 77 to ascertain what Congress really meant by a railroad 'merger or consolidation,' and whether it meant one consented to by both parties to it. No one would contend that the Coast Line could be forced. But the Commission argues that this debtor has also consented, because its stockholders have not appeared to object. I think that does not follow. It is expressly found that the debtor's insolvency is such that the stockholders are not interested parties. The debtor, its property and affairs now belong in equity to the creditors, and more specifically to the refunding bondholders. The full jurisdiction and control over them is in this court. The refunding bondholders by an overwhelming majority do not consent. If the court has the power as a court of bankruptcy to consent for them, under the circumstances of this case it should refuse to do so. I do not think Congress intended to force a merger undesired by the majority in amount of the affected parties by permitting a merger to be part of a plan. This conclusion makes it unnecessary to determine whether the court's power in bankruptcy could be extended to force a merger consistently with the Fifth Amendment. It also ends this plan. * * * "

Judge Sibley disapproved the plan on the further ground that it was not fair and equitable as required by Section 77 (R. Vol. V, pp. 477-480).

On appeal, a majority of the United States Court of Appeals for the Fifth Circuit affirmed the judgment that the plan was unfair and inequitable but reversed Judge Sibley's holding on the statutory issue, 179 F. 2d 538. Of the three circuit judges who heard the appeal, Chief Judge

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Hutcheson and Judge Russell held the plan unfair and inequitable, Judge Russell in a separate concurring opinion. Judge Holmes dissented (p. 545). The majority reversing the statutory holding of Judge Sibley were Chief Judge Hutcheson and Judge Holmes, Judge Russell disagreeing in his separate concurrence. Thus, three separate individual opinions were addressed to the question at issue here.

In agreeing with Chief Judge Hutcheson's disapproval of the plan but not in his rejection of Judge Sibley's views on the forced merger issue, Judge Russell said (p. 545):

> "I concur in the judgment of affirmance, and think that in most respects the decision ably demonstrates the reasons why this should be so. However, since I am in complete accord with the conclusions reached, and expressed in his opinion, by the very able and distinguished Circuit Judge Sibley, who sat in the District Court as United States Judge Designate, I can not accept such contrary views as are expressed in the present opinion."

The "contrary views" expressed by Chief Judge Hutcheson were at most simply the flat conclusion—without benefit of any supporting reasons or indication of *why* he disagreed with Judge Sibley's analysis of the statutory requirements—that the Commission had the power to compel a merger over the objections of the Debtor railroad and all of its creditors. In speaking for the majority of the court on this issue he said (p. 544):

> "We are in no doubt, however, that a plan providing for what the trial judge broadly called a 'forced merger', that is, a merger over the objection of the debtor and all its creditors, might be lawfully certified to the court and lawfully approved and confirmed by it."

We can only speculate as to the reasons which prompted this conclusion because none is given. Perhaps Chief Judge Hutcheson was persuaded by the argument of the Coast Line that the "cram-down" clause of subsection (e) over-

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comes whatever limitations are imposed upon the Commission by the "consistency clause" contained in subsection (f) of Section 77. Such a possibility is suggested by the statement in the opinion immediately following the passage just quoted, wherein it is said (p. 544):

> "The trial judge, while using language broader than the precise determination before him required, recognized that this [i.e., a "forced merger"] was so, in holding that the fact found by the commission, that St. Joe bought the bonds it holds with the desire and purpose to use them to own, control, and run the debtor railroad, and that the plan for merger with the Coast Line would frustrate that desire and purpose, was not a reason for refusing to approve the plan . . . "

Such reasoning seems to be pertinent to the judge's obligation under subsection (e) to determine whether or not objections of creditors are reasonably justified before deciding to confirm a plan of reorganization despite such objections. Other portions of the opinion tend to confirm the suspicion here entertained as to the motivating reason which prompted Chief Judge Hutcheson's conclusion on this statutory issue.[20]

But if the "cram-down" clause is the basis of Chief Judge Hutcheson's conclusion, our answer is the one already discussed in detail above that (1) such a reason nullifies and renders meaningless the "consistency clause" of subsection (f); (2) it overlooks the fact that the language of the "cram-down" clause is undeniably confined to functions of the judge and not the Commission; and (3) it ascribes a purpose to the "cram-down" clause which is not only unsupported but flatly refuted by the legislative history of the provision.

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[20] Such as the observations later made (p. 544) that "unless the opposition is itself unjust and unfair . . . such a plan ought not to be pressed upon, it ought not to be approved by, the trial judge", and that a "forced merger" contrary to the wishes of at least two-thirds of the creditors "is contrary to the statute."

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Some comment should be made on Judge Holmes' dissenting opinion (pp. 545-548). Here, at least, the conclusion that the Commission's plan is authorized under Section 77 is supported by reasons even though we believe them to be unsound.

The basic premise upon which Judge Holmes constructs his opinion is that the plan of the Commission requiring transfer of the property of the Debtor to the Coast Line is a merger expressly authorized by statute but not a "forced merger" about which the statute says nothing. He puts it this way:

> "In the first place, neither the statute nor the plan says anything about a forced merger. The statute expressly provides that a plan of reorganization may include a merger."

The fallacy inherent in the foregoing premise is that the conclusion may be reached only by ignoring the entire basis of petitioners' case—namely, the presence within Section 77 of the "consistency clause". It is true that the statute does not *expressly* say anything about a forced merger, and that the statute does provide in subsection (b) that a plan of reorganization may include a merger. But by virtue of the further provision in subsection (e) that the Commission may authorize the "transfer of any property . . . or merger of the debtor's property . . . to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act . . . ", the admitted purpose of the Interstate Commerce Act to prohibit compulsory mergers becomes as much a part of Section 77 as though it were expressly stated therein. Necessarily, a merger which the Commission cannot authorize upon confirmation cannot be included within a plan of reorganization.

In view of this avoidance of a basic statutory requirement, the remainder of the opinion loses much of its force. Were it not for the "consistency clause", we freely con-

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cede there would be little to petitioners' statutory argument except for its rights under subsection (e) upon confirmation. As for Judge Holmes' view that the merger of the Debtor with respondent is not "forced" because consent by objecting security holders, unlike stockholders, is not required, we refer to our argument above (p. 22) in answer to a similar contention by the Commission despite its finding that the stockholders of the Debtor own no equity and have no rights and that the only equity remaining is owned by the bondholders.[21]

Little more of significance occurred in the courts below with respect to the question of the Commission's statutory authority. When the Commission's Fourth Plan of reorganization was disapproved by Circuit Judge Strum in the District Court as unfair and inequitable, he declined to pass upon the issue, although it was renewed, on the basis that he was bound by the Circuit Court's previous decision.

When the Circuit Court heard argument on appeal of Judge Strum's decision, it sat *en banc* with the exception of Judge Strum. Again the issue of the Commission's statutory authority was raised in brief and at oral argument because petitioners concluded that this fundamental question should be considered by the full bench and was properly resubmitted under the ruling of this Court in *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 199.

A majority of three of the five judges—Chief Judge Hutcheson, who wrote the decision from which this review followed, and Judges Holmes and Rives—merely held that the question had been settled by the court's previous decision, *In Re Florida East Coast Ry. Co.*, 201 F. 2d 325, 330. Two members of the court, however—Judges Russell and Borah —vigorously dissented. Included in the grounds of the dissent is the following statement on the question at issue here (pp. 331-332):

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[21] See also *In re Central Funding Corp.*, 75 F. 2d 256, 259 (2d Cir.); *Investment Registry* v. *Chicago & M. E. R. Co.*, 212 Fed. 594, 609 (7th Cir.).

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"* * * The bald proposition established by the majority opinion is that the court's power in bankruptcy authorizes the taking, against the wishes of the overwhelming majority of the refunding bondholders, of their existing rights, requiring acceptance by them of an entirely different and unrelated security which they do not desire. This holding poses a serious constitutional question as to whether the court's power in bankruptcy could thus be extended to force a merger consistent with the Fifth Amendment. However, in my view of the case I do not reach the constitutional question because here it is clear from the history of the legislation of Section 77, that the Commission has undertaken to exercise a power which the Congress never intended to confer on the Commission. This was well pointed out by Judge Sibley in his decision while sitting as District Judge in a former proceeding in this matter. In re Florida East Coast Railway Co., D. C., 81 F. Supp. 926. This view was expressly approved by the writer in his special concurrence upon the former appeal of this case. Atlantic Coast Line v. St. Joe Paper Co., 5 Cir., 179 F. 2d 538, 545. It is reaffirmed today."

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the cause remanded with directions to disapprove the Commission's plan as unauthorized by law.

Respectfully submitted,

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